Supreme Court, U.S.
FILED

(1) 961360 FEB 25 1997

No. _____

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM 1996

CLYDE E. CLEMENTS, JR.,

Petitioner,

v.

THE BABCOCK & WILCOX COMPANY, et al.,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Clyde E. Clements, Jr.
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67pp

QUESTION PRESENTED FOR REVIEW

1. The United States Court of Appeals for the Fourth Circuit dismissed both my Motion to Vacate Judgments on grounds of fraud on the court, and my Motion for Leave to Present Oral Argument. In its Order (App., *infra*, 1a, 2a)[1] the Appeals Court cites its Local Rule 40(d), which does not allow the Appeals Court to entertain a request for relief after denial of rehearing. Further, the Appeals Court's Local Rule 46(f) states, in relevant part, "* * * Cases involving pro se litigants are ordinarily not scheduled for oral argument." The question before the Court is whether the Appeals Court's Local Rules 40(d) and 46(f) must be struck down as unconstitutional, in that they deprive me of my Constitutionally guaranteed right to petition the government for redress of grievances; and of my right to due process of law.

---

[1] "App., *infra*, __" refers to a page number of the Appendix attached hereto.

PARTIES TO THE PROCEEDING

PETITIONER-PLAINTIFF: Clyde E. Clements, Jr.

RESPONDENT-DEFENDANTS: The Babcock & Wilcox Company; Employee Assistance of Central Virginia, Incorporated; Frank C. Allen, Jr.; Merle T. Alvis; Laurie L. Boykan; James A. Conner; John P. Eckert; John A. Fees; Susan S. Grainger; Robert E. Howson; Dewitt T. Lefew, III; Lawrence L. Lineberry; Lonza R. Pagans, Jr.; George K. Slough; Steven W. Smith; and Roger E. Tetrault.

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In the
Supreme Court of the United States

October Term, 1996

CLYDE E. CLEMENTS, JR, *Petitioner*

V.

THE BABCOCK & WILCOX COMPANY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Clyde E. Clements, Jr. respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Order of the Court of Appeals is set out in the Appendix, *infra*, 1a-2a. Clements v. Babcock & Wilcox, et al., Record No. 95-2053 (4th Cir. December 9, 1996). That Order dismissed my motion to vacate judgments and my motion for leave to present oral argument.

There is no opinion of the District Court, since the Motion to Vacate Judgments subject of this petition was filed in the Fourth Circuit Court of Appeals only.

STATEMENT OF JURISDICTION IN THIS COURT

The Court of Appeals filed its Order dismissing my Motion to Vacate Judgments and my Motion for Leave to Present Oral Argument on December 9, 1996 (App., *infra.*, 1a - 2a). No motion for extension of time for filing a Petition for Certiorari has been filed.

This Court has jurisdiction to consider this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106. The Order of the Court of Appeals dismissing my Motion to Vacate judgments; and my motion for leave to present oral argument was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

STATUTES INVOLVED IN THE CASE

28 U.S.C.A. Rules, United States Court of Appeals for the Fourth Circuit Local Rules: 40(d), which states, in relevant part, "* * * the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the Court has denied a petition for rehearing or the time for filing a petition for rehearing has expired."; and 46(f), which states, in relevant part, "* * * Cases involving pro se litigants are ordinarily not scheduled for oral argument."

First Amendment to the U.S. Constitution states, in relevant part, that "Congress shall make no law * * * abridging the right of the people to * * * petition the Government for a redress of grievances."

Fifth Amendment to the U.S. Constitution states, in relevant part, "* * * nor shall any person be deprived of life, liberty, or property, without due process of law."

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of 28 U.S.C.A. Rules, United States Court of Appeals for the Fourth Circuit Local Rules 40(d) and 46(f), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

This civil action was brought by me, Petitioner-plaintiff Clyde E. Clements, Jr. against The Babcock & Wilcox Company ("B&W"), et al., under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq. ("Title VII"), under 42 U.S.C. § 1985(3), and under pendent claims arising under the common law of the Commonwealth of Virginia. The District Court had jurisdiction of my claims in the first instance pursuant to 42 U.S.C. § 2000e et seq., 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

I am a 50 year-old white male. At the time of the events giving rise to this litigation, I was employed by the Naval Nuclear Fuel Division ("NNFD") of the Babcock & Wilcox Company ("B&W") as an engineer. I was hired by B&W, on June 18, 1984; and I was fired by B&W without notice on September 21, 1992.

I filed my employment discrimination Complaint with the District Court on October 30, 1992. D.E. 1.[2] On April 24, 1995 the District Court granted B&W's pre-trial Motion for Summary Judgment and entered a final judgment in favor of all defendants. D.E. 68.

My appeal was docketed by the U.S. Court of Appeals for the Fourth Circuit ("Appeals Court") on May 31, 1995; and on November 27, 1995, the Appeals Court entered judgment affirming the decision of the District Court (App., *infra*, 9a, 10a). On December 11, 1995 I filed my Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc with the Appeals Court; and on January 12, 1996 the Appeals Court filed its Order denying my Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc (App., *infra*, 7a, 8a).

On April 15, 1996, this Court denied my Petition for Writ of Certiorari (App., *infra*, 6a); and on June 3, 1996, this Court denied my Petition for Rehearing (App., *infra*, 5a), a copy of which is attached hereto (App., *infra*, 36a-49a).

On April 24, 1996 the District Court filed my Rule 60(b) Motion to Vacate Judgments (D.E. 71); and on June 27, 1996 the District Court entered its Order denying my Motion to Vacate Judgements (D.E. 74; App., *infra*, 3a, 4a). I did not appeal the District Court's decision because of the judge's warning of possible sanctions, included in the Order. Please see Appendix, *infra.*, 4a, first paragraph.

---

[2]"D.E. __" refers to the docket entry numbers on the docket sheets maintained by the District Court.

On December 3, 1996 the Appeals Court filed my Motion to Vacate Judgments on grounds of fraud on the Appeals Court by the Appeals Court (App., *infra*, 11a-35a), and my Motion for Leave to Present Oral Argument. On December 9, 1996 the Appeals Court filed its Order dismissing both motions (App., *infra*, 1a, 2a).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit Court of Appeals is the only Circuit that has adopted a local rule that deprives a litigant of his right to seek relief from the Appeals Court after denial of rehearing. Further, the Fourth Circuit is the only Circuit to adopt a local rule that deprives a pro se litigant of his right to present oral argument before the Appeals Court.

I. The Appeals Court's Local Rules 40(d) and 46(f) Are Unconstitutional

The Appeals Court relies on its Local Rule 40(d) in its Order dismissing my Motion to Vacate Judgments without determining the merits of my claims (App., *infra*, 1a, 2a). Local Rule 40(d) states, in relevant part,

> * * * the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the Court has denied a petition for rehearing * * *.

This is clearly in conflict with the First Amendment to the U.S. Constitution, which states, in relevant part, "* * * Congress shall make no law * * * abridging * * * the right of the people * * * to petition the Government for a redress of grievances." I allege fraud on the Appeals Court by the Appeals Court. Local Rule 40(d) deprives me of my right to

petition the Appeals Court for redress of grievances allegedly caused by the Appeals Court.

Local Rule 40(d) is also clearly in conflict with the Fifth Amendment to the U.S. Constitution, which states, in relevant part, "No person shall be * * * deprived of * * * property, without due process of law * * *." I allege in my complaint that I was fired in retaliation for complaining of acts made unlawful by Title VII. The loss of my job resulted in a significant loss of income, and of other property. It is an undisputed fact that the Appeals Court denied me a hearing of my Motion to Vacate Judgments on grounds of fraud on the Appeals Court by the Appeals Court. The Appeals Court therefore deprived me of my right of due process of law.

The Appeals Court's Local Rule 46(f) states, in relevant part, "* * * Cases involving pro se litigants are ordinarily not scheduled for oral argument."

It logically follows that the Appeals Court's Local Rule 46(f) also is in conflict with the First and Fifth Amendments to the U.S. Constitution, and for the same reasons stated above.

Local Rule 46(f) is discriminatory in that it deprives pro se litigants of the same opportunities for success as those afforded litigants who were successful at securing legal representation. Appellate Practice - Virginia & Federal Courts, Committee on Continuing Legal Education (2nd Ed., 1992), states at 101:

> Judge Winter [Fourth Circuit appellate judge] states: "Let me add in closing that despite intensive preargument preparation of a case by the judges and

> the tentative conclusions that a judge may hold about a case before it is argued, effective oral argument does have a substantial impact on how the case is decided. * * * Mr. Justice Brennan of the U.S. Supreme Court has said: [O]ral argument is the absolutely indispensable ingredient of appellate advocacy * * *"

First set of brackets and their contents added.

The Appeals Court's Local Rules 40(d) and 46(f) are also in conflict with 28 USCS § 2071., which states, in relevant part,

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules *shall be consistent with Acts of Congress* and rules of practice and procedure under section 2072 of this title.

(Italics added)

Since the First and Fifth Amendments to the U.S. Constitution are acts of Congress, it logically follows that the Appeals Court's Local Rules 40(d) and 46(f) are also in conflict with 28 USCS § 2071.

II. Many Are Affected

I am not the only litigant affected. The rights of every federal appeals court litigant in the states of Virginia, West Virginia, North Carolina, South Carolina and Maryland are affected by the unconstitutional Local Rule 40(d) of the Fourth Circuit Appeals Court. Further, all Fourth Circuit pro se appeals court litigants of these states are affected by unconstituitional Local Rule 46(f).

III. The Question Presented is Important

Injured parties' right to petition -- unobstructed -- the court in which the fraud occurred for a redress of grievances is essential to our judicial system's efforts in promoting and upholding the integrity of our judiciary.

I allege in the Memorandum attached to my Motion to Vacate Judgments (App., *infra*, 14a-35a) that the Appeals Court's affirming the District Court's decision; and the Appeals Court's denying my Petition for Rehearing were obtained by fraud on the Appeals Court -- and that the fraud was committed by the appellate judges. While the task of determining the merits of my allegations of fraud is not now before this Court, whether our judiciary has the will to strike down a judicially-created barrier to an injured party's holding the judiciary responsible and accountable for its actions is very much at issue, here.

Mr. William Suter, Clerk of this Court, stated during his recent speaking engagement at Sweet Briar College, that approximately 7,000 petitions are filed each year with the Supreme Court, 2,000 of which are from "paid petitioners"; and, in essence, that the Supreme Court agrees to hear about 60 of those 2,000 (Ref.: Lynchburg, Virginia's The News and Advance, January 24, 1997 edition). Unresolved issues that raise questions about the integrity of our judiciary are far too important to be left to those odds of being addressed.

I include in the Appendix attached hereto my Petition for Rehearing (App.,*infra*, 36a-49a), in which I presented to this Court facts of record that make out a case of fraud on the court by the court, to demonstrate that the unresolved issue of the integrity of our judiciary has once before fallen victim

to the aforementioned 1-in-33 odds of being addressed by this Court. As is apparently common knowledge among officers of the court, a "cert. denied" means nothing more:

> * * * as the Court has consistently said, "[t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923) * * * The Court has added that the orthodox rule that a denial imports no expression on the merits "is particularly appropriate where the decision sought to be reviewed is essentially a factual determination." *United States v Shubert*, 248 U.S. 222, 229 n. 10 (1955).

Supreme Court Practice, (7th Edition, 1993) at 239

My point is this: A "cert. denied" cannot possibly convey to the public a resolve by this Court to promote and uphold the integrity of our judiciary where, as here, the determination sought to be reviewed relates to an unresolved issue that puts the integrity of our judiciary into question.

Thomas Jefferson wrote in his December 25, 1820 letter to Thomas Ritchie,

> * * * A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government."

Thomas Jefferson, Writings (7th printing, 1984) at 1446.

It is no doubt the will of the public that this Court maintain a constant vigil for, and act without hesitation on unresolved issues that give the appearance that the integrity of our judiciary has been compromised. If not the United States Supreme Court Justices, then who? If not now -- when?

> * * * Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of the litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S.Ct. 997 at 1001, 322 U.S. 238.

CONCLUSION

For the reasons given hereinabove, I, pro se Petitioner-plaintiff Clyde E. Clements, Jr. respectfully request that my Petition be granted, and that a writ of certiorari issue in this cause.

February 18, 1997

Respectfully submitted,

Clyde E. Clements, Jr. pro se
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

APPENDIX

APPENDIX

1 - United States Court of Appeals for the Fourth Circuit Order dismissing my Motion to Vacate Judgments, filed December 9, 1996 . . . . . 1a, 2a

2 - United States District Court Order Denying my Motion to Vacate Judgments, Entered June 26, 1996 . . . . . 3a, 4a

3 - United States Supreme Court Notification Dated June 3, 1996, of this Court's Denial of my Petition for Rehearing 5a

4 - United States Supreme Court Notification Dated April 15, 1996, of this Court's Denial of my Petition for Writ of Certiorari 6a

5 - United States Court of Appeals for the Fourth Circuit Order Denying my Petition for Rehearing, filed January 12, 1996 . . . . . 7a, 8a

6 - Per curiam opinion of the United States Court of Appeals for the Fourth Circuit, decided November 27, 1995 . . . . . 9a, 10a

7 - Motion to Vacate Judgments with Memorandum, filed by the United States Court of Appeals for the Fourth Circuit, on December 3, 1996 . . . . . 11a-35a

8 - Petition for Rehearing, Record No. 95-1314, Submitted to the United States Supreme Court 36a-49a

FILED: December 9, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2053
CA-92-61-L

Clyde E. Clements, Plaintiff/Appellant,

v.

Babcock & Wilcox Company; Merle T. Alvis; James A. Conner; Roger E. Tetrault, Defendants/Appellees,

and

Employee Assistance of Central Virginia, Incorporated; Frank C. Allen, Jr.; Laurie L. Boykan; John P. Eckert; John a. Fees; Susan S. Grainger; Robert E. Howson; Dewitt T. Lefew, III; Larry L. Lineberry; Lonza R. Pagans, Jr.; George K. Slough; Steven W. Smith, Defendants.

ORDER

On November 27, 1995, this Court entered judgment affirming the decision of the district court. On January 12, 1996, this Court denied appellant's petition for rehearing with suggestion for rehearing in banc. On April 15, 1996, the U.S. Supreme Court denied appellant's petition for writ of certiorari.

Appellant has now filed in this Court a motion to vacate its judgment affirming the district court and its order denying rehearing and a motion for oral argument.

The Court will not entertain a request for relief after the denial of rehearing. See Local Rule 40(d). Appellant's motion to vacate and request for oral argument are dismissed in accordance with Local Rule 40(d).

FOR THE COURT - BY DIRECTION

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CLYDE E. CLEMENTS, JR.,) Civil Action No. 92-61-L
Plaintiff,)
v.) Order
THE BABCOCK &)
WILCOX COMPANY, et al.,) By: Honorable James C. Turk
Defendant.) United States District Judge

CLYDE E. CLEMENTS, JR., proceeding pro se initially brought this action on October 30, 1992 against his former employer, The Babcock & Wilcox Company, and several individual defendants. The plaintiff alleged that he was wrongfully terminated in violation of Title VII to the Civil Rights Act of 1964. 42 U.S.C. §2000e, et seq. The court granted summary judgment for the defendant on April 24, 1995 and that decision was subsequently affirmed by the Fourth Circuit Court of Appeals.

Clements now comes before this court requesting that the court's earlier grant of summary judgment be vacated. Fed. R. Civ. P. 60(b). Although the plaintiff requests relief from this court's Final Order, he does not come forth with any new evidence, nor has he shown that the defendant committed any sort of fraud which would render the judgment void. Instead, he states that this court did not properly review his case and in so doing, abused its discretion. Such an allegation is totally devoid of merit, especially in light of the Fourth Circuit's opinion.

Consequently, it is hereby **ORDERED** that Clyde E. Clements' Rule 60(b) Motion to Vacate the court's judgment is **DENIED**.

This case is closed and the Supreme Court's denial of

Clements' petition for a writ of certiorari decisively concluded the matter. The plaintiff is advised that any further pursuit of this case in this court, or with an appellate tribunal, could well result in the imposition of Rule 11 sanctions.

The Clerk is directed to send certified copies of the Final Order to the plaintiff and counsel of record for the defendants.

ENTER: THIS 26th DAY OF JUNE, 1996.

/S/ James C. Turk
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 3, 1996

Mr. Clyde E. Clements, Jr.
Post Office Box 3391
Lynchburg, VA 24503

Re: Clyde E. Clements, Jr.
v. Babcock & Wilcox Company, et al.
No. 95-1314

Dear Mr. Clements:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,
/S/ William K. Suter
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 15, 1996

Mr. Clyde E. Clements, Jr.
Post Office Box 3391
Lynchburg, VA 24503

Re: Clyde E. Clements, Jr.
v. Babcock & Wilcox Company, et al.
No. 95-1314

Dear Mr. Clements:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,
/S/ William K. Suter
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 12, 1996
No. 95-2053
CA-92-61-L

CLYDE E. CLEMENTS

Plaintiff - Appellant

v.

BABCOCK & WILCOX COMPANY; MERLE T. ALVIS; JAMES A. CONNER; ROGER E. TETRAULT

Defendants - appellees

and

EMPLOYEE ASSISTANCE OF CENTRAL VIRGINIA, INCORPORATED; FRANK C. ALLEN, JR.; LAURIE L. BOYKAN; JOHN P. ECKERT; JOHN A. FEES; SUSAN S. GRAINGER; ROBERT E. HOWSON; DEWITT T. LEFEW, III; LARRY L. LINEBERRY; LONZA R. PAGANS, JR.; GEORGE K. SLOUGH; STEVEN W. SMITH

Defendants

On Petition for Rehearing with Suggestion for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2053

CLYDE E. CLEMENTS,

Plaintiff-Appellant,

versus

BABCOCK & WILCOX COMPANY; MERLE T. ALVIS; JAMES A CONNER; ROGER E. TETRAULT,

Defendants-Appellees,

and

EMPLOYEE ASSISTANCE OF CENTRAL VIRGINIA, INCORPORATED; FRANK C. ALLEN, JR.; LAURIE L. BOYKAN; JOHN P. ECKERT; JOHN A. FEES; SUSAN S. GRAINGER; ROBERT E. HOWSON; DEWITT T. LEFEW, III; LARRY L. LINEBERRY; LONZA R. PAGANS, JR.; GEORGE K. SLOUGH; STEVEN W. SMITH,

Defendants.

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. James C. Turk, District Judge. (CA-92-61-L)

Submitted: November 16, 1995
Decided: November 27, 1995

Before MICHAEL and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Clyde E. Clements, Appellant Pro Se. Jenny Chien-Jen Wu, Jon A. Geier, PAUL, HASTINGS, JANOFSKY & WALKER, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant appeals from the district court's orders striking some Defendants and claims from his second amended complaint and granting summary judgment for Defendants on the remaining claims in this employment discrimination action in which Appellant alleged sexual harassment and retaliatory treatment and discharge. We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Clements v. Babcock & Wilcox Co., No. CA-92-61-L (W.D. Va. Sept. 9, 1994 & Apr. 24, 1995). We deny as moot Appellant's motion to disqualify the district court judge. Additionally, we deny Appellant's motion for oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

RECORD NO. 95-2053

CLYDE E. CLEMENTS, JR.,
Plaintiff-Appellant,

V.

THE BABCOCK & WILCOX COMPANY,
MERLE T. ALVIS,
JAMES A. CONNER, and
ROGER E. TETRAULT,
in their individual and official capacities,
Defendants-Appellees.

APPELLANT'S MOTION TO VACATE JUDGMENTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

Clyde E. Clements, Jr., pro se
P. O. Box 3391
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In The United States Court of Appeals For The Fourth Circuit

Record No. 95-2053

CLYDE E. CLEMENTS, JR.,
Plaintiff-Appellant,

V.

THE BABCOCK & WILCOX COMPANY, et al.
Defendants-Appellees.

APPELLANT'S MOTION TO VACATE JUDGMENTS

COMES NOW the Appellant, Clyde E. Clements, Jr., pro se, and respectfully moves the United States Court of Appeals for the Fourth Circuit to vacate and set aside the following judgments entered in the above-titled action, on the ground of fraud on the Court on the part of those Appellate Judges responsible for affirming the District Court's judgments; and on the part of those Appellate Judges responsible for denying Appellant's Petition for Rehearing with Suggestion for Rehearing in Banc:

A. Judgment affirming the District Court's granting of defendants' motion for summary judgment in Civil Action No. 92-00061-L, decided on November 27, 1995, and;

B. Judgment denying Appellant's Petition for Rehearing with Suggestion for Rehearing in Banc, filed on January 12, 1996.

This Motion is based upon the attached memorandum of points and authorities; and upon the record in this action and the record in the court below of Civil Action No. 92-00061-L.

December 2, 1996

Respectfully submitted,

/s/ Clyde E. Clements, Jr.

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IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

RECORD NO. 95-2053

CLYDE E. CLEMENTS, JR.,
Plaintiff-Appellant,

V.

THE BABCOCK & WILCOX COMPANY,
MERLE T. ALVIS,
JAMES A. CONNER, and
ROGER E. TETRAULT,
in their individual and official capacities,
Defendants-Appellees.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S MOTION TO VACATE JUDGMENTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

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Title 18, Section 1001. of the U.S. Code 12

Title VII of the Civil Rights Act of 1964, as amended passim

Other

Black's Law Dictionary (6th Ed. 1990) 9

Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev., 133 . . . . . 1, 7

The Responsible Judge : Readings in Judicial Ethics, (Praeger, 1993) 1

PRELIMINARY STATEMENT

The conduct of the presiding District Court judge, as documented by the record of the court below, satisfies the requirements established by case law for making out a claim of fraud on the court. The appellate judges, by their stating in their unpublished per curium opinion decided November 27, 1995, "* * * we affirm on the reasoning of the District Court.", have committed the same fraud on the court as that by the presiding judge of the court below.

The unpublished per curium opinion also states, "Before MICHAEL and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge."; but it is unsigned. In the case that the Fourth Circuit Court of Appeals' office staff processed my appeal in lieu of Judges Michael, Motz and Butzner, then the appellate judges have committed two acts of fraud relating to instant case.[1]

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[1] Then U.S. Circuit Judge Ruth Bader Ginsburg, U.S. Court of Appeals, D.C. Circuit, wrote a paper entitled *Remarks on Writing Separately*, which was published in 1990 by the Washington Law Review (65 Wash. L. Rev., 133). The following is excerpted from that paper:

> In the press to keep up with a mounting case load, my circuit and others nowadays dispose of a high percentage of cases by unpublished judgment, sometimes accompanied by concise memorandum.[34] These abbreviated dispositions are, without exception, unsigned and, almost without exception, unanimous. I betray no confidence when I tell you that unsigned work products, more often than signed opinions, are fully composed by hands other than a judge's own--by staff attorneys and law clerks--and

The appellate judges denied my Petition for Rehearing with Suggestion for Rehearing in Banc in their unsigned Order filed January 12, 1996. If the Appeals Court's office staff also processed my Petition in lieu of the appellate judges, then the appellate judges have committed a total of three acts of fraud.

STATEMENT OF FACTS PERTINENT TO APPELLANT'S MOTION TO VACATE JUDGMENTS

I, pro se Appellant, was fired by my former employer, The Babcock & Wilcox Company ("B&W") on September 21, 1992. On the same day B&W issued its discharge document relating to its firing of me. Statement of Undisputed Material Facts In Support of Defendant Babcock & Wilcox Company's Motion for Summary Judgment filed 12/9/94, Exh. M. Thereafter, I timely filed a charge of retaliatory discharge with the Equal Employment Opportunity Commission ("EEOC").

Footnote No.1 continued:

> let out with scant editing by the supervising panel. Judges generally do not labor over unpublished judgments and memoranda, or even published per curiam opinions, with the same intensity they devote to signed opinions. As a bright commentator observed in a related context: 'When anonymity of pronouncement is combined with security in office, it is all too easy for the politically insulated officials to lapse into arrogant *ipse dixits*.'[35]

The Responsible Judge : Readings in Judicial Ethics, (Praeger, 1993) at 175

The EEOC subsequently documented that it had found in the record proof of prima facie retaliatory discharge -- i.e., that it had found that B&W's discharge document is the causal connection between my complaining of acts made unlawful by Title VII and B&W's firing me -- in its Letter of Determination dated February 23, 1994, a copy of which was filed with the District Court as "Attachment Y" to my Second Amended Complaint. D.E. 22, Attach.Y.[2]

("**EEOC Proof of Prima Facie Retaliatory Discharge**")

I timely filed my retaliatory discharge claim against B&W, et al., with the District Court (Civil Action No. 92-00061-L) under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq., as Count Two of my Second Amended Complaint. D.E. 22.

I served a subpoena duces tecum on defendant Employee Assistance of Central Virginia, Inc. ("EACV") on November 2, 1994, in which I specifically requested that EACV produce all documents relating to the personality test EACV had me take. EACV did not produce them, even though it had previously provided two government agencies with a copy.

The defendants, in their Jon Geier, counsel for defendants letter of January 4, 1995 to me, state, "* * * I told you that we have already confirmed to you that the document is not contained in the files of either B&W or EACV." "the document" is the MMPI Interpretation relating to the so-called MMPI personality test that EACV had me take.

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[2] "D.E. at ___" refers to the docket entry numbers on the docket sheets maintained by the District Court for instant case, Civil Action No. 92-00061-L.

The defendants therefore admit in said January 4, 1995 Jon Geier letter that they removed the confidential MMPI Interpretation from my confidential record maintained by EACV. Removal of documents from my confidential record maintained by EACV is in violation of §54.1-2400.6 of the Code of Virginia.

I filed said January 4, 1995 Jon Geier letter with the court as "Exhibit O" to my Supplement to Plaintiff's Memorandum in Support of Plaintiff's Motion to Compel the defendants to answer my discovery requests (D.E. filed 1/9/95). Said letter establishes as an undisputed fact that the defendants removed a confidential document from my confidential record maintained by EACV.

B&W claims in its Motion for Summary Judgment that I was fired for disloyalty. Memorandum of Points and Authorities in Support of Defendant Babcock & Wilcox Company's Motion for Summary Judgment filed 12/9/94 at 15. I asked defendant James Conner ("Conner"), then Vice President and General Manager of B&W's Naval Nuclear Fuel Division, during my taking of his deposition, "Do you have any reason to believe that I was a disloyal employee?"; to which Conner responded, "No." D.E. 63; D.E. 69 at 13.

Conner's "No" response contradicts B&W's key assertion that it fired me for disloyalty. This creates a genuine issue of material fact. There being a genuine issue of material fact, this issue must go to trial. ("**Loyalty Issue**")

I filed my second Motion to Compel B&W to answer my discovery requests on March 2, 1995. D.E. 59. The defendants had refused to answer certain portions of my first set of discovery requests; and had ignored my second set of discovery requests altogether. In my Motion I specifically requested that it be heard along with defendants' Motions for Summary Judgment in the hearing that had already been set. B&W filed its Motion to Stay Discovery on the same day.

D.E. 58. The Court granted B&W's Motion to Stay Discovery on March 7, 1995 (D.E. 62), thereby denying me a hearing of my Motion to Compel. The Hearing of Motions took place on March 9, 1995, during which the only motions argued were defendants' Motions for Summary Judgment. D.E. 66.

The record documents that I brought the **EEOC Proof of Prima Facie Retaliatory Discharge** (causation element) and the **Loyalty Issue** before the District Court numerous times. D.E. 66 at 29, 30, 33 & 34; D.E. 55 at 15, 16 & 20; D.E. 57 at 4, 5 & 7.

The District Court granted defendants' Motion for Summary Judgment, thereby dismissing my retaliatory discharge claim. D.E. 68. The District Court did not address - nor did it even mention - the **EEOC Proof of Prima Facie Retaliatory Discharge** or the **Loyalty Issue** in its Memorandum Opinion. D.E. 67.

Thereafter, I appealed the District Court's dismissal of my case to the United States Court of Appeals for the Fourth Circuit ("Appeals Court"). Among other things, I alerted the Appeals Court to the proof on record of obstruction of justice by the defendants in my Supplement No. 3 to Informal Reply Brief of Appellant, at 4, 5, filed on November 7, 1995. The Appeals Court issued an unpublished unsigned per curium opinion affirming on the reasoning of the District Court, on November 27, 1995.

Thereafter, I filed with the Appeals Court my Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc, which alerted the Appeals Court to the courts' oversight of the **EEOC Proof of Prima Facie Retaliatory Discharge**, the **Loyalty Issue**, evidence of defendants' obstruction of justice contained in the record of the District Court and their oversight of other facts of record. The Appeals Court, on January 12, 1996 filed its unsigned Order

denying my Petition for Rehearing.

In said Petition, I cite nine (9) 4th Circuit cases in support of my argument. The appellate judges, by their denying my Petition, turned their backs to their own rulings.

The District Court and Appeals Court's oversight of the **EEOC Proof of Prima Facie Retaliatory Discharge** and the **Loyalty Issue**; and the Appeals Court's failure to reverse at least in part and remand at least my retaliatory discharge claim for trial was brought to the attention of the United States Supreme Court in my Petition for Writ of Certiorari. My Petition was denied on April 15, 1996.

On April 24, 1996 I filed my Motion to Vacate Judgments on grounds of fraud on the court by U.S. District Court Judge James C. Turk. D.E. 71. Judge Turk presided over the hearing of said motion to vacate judgments, and dismissed the motion as frivolous. As documented by the Order dismissing the motion, Judge Turk threatened me with sanctions if I elected to appeal his decision. D.E. 74.

REASONS FOR GRANTING THIS MOTION

The record of instant case contains proof of fraud on the court by the District Court judge. The appellate judges, by their stating on Page 2 of their unpublished unsigned per curiam opinion, " * * * we affirm on the reasoning of the district court.", have repeated the presiding District Court judge's fraud on the court. By so stating, the appellate judges responsible for processing my appeal and Petition for Rehearing have made themselves party to the fraud on the court committed by the presiding District Court judge.

I. THE CONDUCT OF THE PRESIDING DISTRICT COURT JUDGE; AND THE APPEALS COURT'S AFFIRMING ON THE REASONING OF THE DISTRICT COURT SATISFY THE

REQUIREMENTS ESTABLISHED BY CASE LAW FOR MAKING OUT A CLAIM OF FRAUD ON THE COURT:

A. Scheme of Abuses of Discretion:

The presiding United States District Court judge carried out numerous abuses of discretion which, viewed as a whole display a pattern of intentional misconduct; a scheme the intent of which was to prevent instant case from proceeding to trial *regardless* of the weight of evidence of record in support of my claims. The thus-far successful scheme was deliberate and unconscionable, and represents fraud on the court on the part of the presiding judge.

> In order to set aside a judgment or order because of fraud upon the court under rule providing for such relief, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.

Lockwood v. Bowles, 46 F.R.D. 625 (1969) at 626.

Following are some of the abuses of discretion:

1. The Presiding District Court Judge and The Appellate Judges Prevented Appellant from Fully and Fairly Presenting his Case.

> *Rule 60(b)(3) Requirements:* * * * The conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense.

Rozier v. Ford Motor Co., 573 F.2d 1332 (1978) at 1339.

On January 4, 1995 I filed my motion to extend time to complete my discovery. D.E. 45. On or about January 12, 1995 I served my second set of discovery requests on defendants. D.E. dated 1/12/95. On January 17, 1995 the

District Court filed its Order denying my motion to extend time to complete discovery. D.E. 53.

On March 2, 1995 I filed my motion to compel B&W to answer my discovery requests. D.E. 59. In my motion I specifically requested that my motion to compel be heard during the hearing of defendants' motions for summary judgment, which had already been set. On the same day B&W filed its motion to stay discovery. D.E. 58. On March 7, 1995 the District Court filed its Order granting defendants' motion to stay discovery (D.E. 62), thereby denying me a hearing of my motion to compel. The hearing of defendants' motions for summary judgment took place on March 8, 1995. D.E. 66.

The presiding judge then compounded his error by granting defendants motions for summary judgment (D.E. 67 and 68) on the ground that I had presented insufficient evidence in support of my claims.

2. The Presiding District Court Judge and the Appellate Judges Ignored the EEOC's Findings:

Not only did the presiding District Court and appellate judges not give deference to the EEOC's findings,[3]

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[3] Justice Ruth Bader Ginsburg (then appeals court judge for the D.C. Circuit), in her 1990 Washington Law Review article entitled *Remarks on Writing Separately*, states,

> We permit our appellate judges to disagree or distance themselves from the court's judgment by dissenting or concurring opinion. At the same time, we have doctrines, like *deference to expert administrative determination*, that serve, among other purposes,[6] to keep the individuality of our judges within tolerable bounds.

65 Washington L. Rev., 133 at 134. (Italics added)

they completely ignored them -- namely, a) the EEOC's finding that the incident I complained of as sexual harassment occurred (Attach. O-1 to D.E. 22); and b) the EEOC's finding that B&W's discharge document is the evidence of record that is the causal connection between my complaining of acts made unlawful by Title VII, and B&W's firing me (Attach. Y to D.E. 22).

The presiding District Court judge states in his Memorandum Opinion that the record contains no evidence in support of my retaliatory discharge claim:

> While he has shown that he engaged in protected activity, pursuing claims of employment discrimination with the EEOC, and that the employer took adverse action against him by way of his termination, Clements has failed to prove the causation element. * * * Because plaintiff has presented no evidence, other than the fact of his termination, to show retaliatory intent, ne has failed to make out a prima facie case of discrimination.

D.E. 67 at 9, 10.

The fact is that the "causation element", or **EEOC proof of Prima Facie Retaliatory Discharge**, supra, is in the record in three (3) separate documents: D.E. 55 at 15, 16; D.E. 57 at 4, 5; and D.E. 66. Further, the "causation element" was presented to the Appeals Court in three separate documents: Informal Brief of Appellant filed June 26, 1995, at 7-9; Informal Reply Brief of Appellant filed August 23, 1995, at 14-19; and Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc filed December 11, 1995, at 4, 5.

3. The Presiding District Court Judge and the Appellate Judges Ignored Facts of Record that Create Genuine Issues for Trial:

"District court may not resolve conflicts in evidence

on summary judgment motions." Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) at 149.

a) The Loyalty Issue:

The presiding District Court judge states in his Memorandum Opinion:

> More importantly, plaintiff has not presented a shred of evidence, other than bare allegations, to meet his burden to show that B&W would not have terminated him but for his claims with the EEOC. * * * Clements has not presented a scintilla of evidence to show that B&W's stated reasons for his discharge were merely a pretext.

D.E. 67 at 9, 11.

B&W claims in its Memorandum of Points and Authorities in Support of Defendant Babcock & Wilcox Company's Motion for Summary Judgment filed 12/9/94 at 15 that I was fired for disloyalty. And B&W stated under oath that I was not a disloyal employee. D.E. 66 at 33, 34; D.E. 69 at 13. B&W's contradicting its key assertion that it fired me because I was disloyal creates a genuine issue of material fact. There being an issue of material fact, this issue should have gone to trial -- but it did not. Instead, the District Court judge and the appellate judges completely ignored it, as if the supporting facts were not on record.

The **Loyalty Issue**, supra, is in the record of the District Court in three (3) separate documents: D.E. 55 at 20; D.E. 57 at 7; and D.E. 66 at 33, 34. The **Loyalty Issue** was presented to the Appeals Court in three (3) separate documents: Informal Brief of Appellant at 23; Informal Reply Brief of Appellant at 12, 13; and Petition for Rehearing with Suggestion for Rehearing in Banc at 1.

b) The Issue of Consent:

B&W claims that my letter-writing to the Department of Energy and others was the disloyal conduct for which

B&W fired me. Memorandum of Points and Authorities in Support of Defendant Babcock & Wilcox Company's Motion for Summary Judgment filed 12/9/94, at 15. I presented to the court evidence that B&W had given me its constructive assent,[4] or implied consent[5] to continue my letter-writing, including but not limited to:

1) B&W never made me aware of any displeasure it may have had with my letterwriting; and it never gave me a directive to stop my letter-writing;

2) B&W documented in office notes that it told me that any concerns I had regarding the government were between the government and me;

3) B&W rewarded me with raises and promotions for the duration of my letter-writing, presumably for good job performance and good conduct;

4) B&W brought the DOE into the confrontation -- not me.

c) The Presiding District Court Judge Decided the Issue of Appellant's Credibility During

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[4] Constructive assent defined:

> An assent or consent imputed to a party from a construction or interpretation of his conduct or interpretation of his conduct; as distinguished from one which he actually expresses.

Black's Law Dictionary (6th Ed. 1990), at 313

[5] Implied consent defined:

> An inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or a lack of objection under circumstances signifying assent.

Black's Law Dictionary (6th Ed. 1990), at 305

The Hearing of Motions:

The presiding judge put my credibility on trial during the hearing of defendants' motions for summary judgment, and appears to have found me guilty of unintentionally lying as a result of paranoia. Even though the record contained the EEOC's finding that the incident I complained of as sexual harassment ocurred; i.e., that defendant Boykan had in fact approached me with her blouse unbuttoned (Attach. O-1 to D.E. 22), the judge said to me:

> But a person that is paranoid never knows that they are paranoid and you can never reach them on these things. * * * that's a horrible thing to do if the lady didn't do it. * * * And she says that she didn't recall any buttons were unbuttoned. What else could she do in denying it? This lady has vehemently --- And. you know, if you've made this up on this lady, that's a terrible, terrible thing to do. * * * I think that, you know, whether it occurred --- I think you think that it occurred. I'm not saying that you are intentionally lying. * * * That is an indicia of paranoia * * * Have you been to a psychiatrist?

Transcript of motions hearing, D.E. 66 at 19, 21, 22, 25, 26

Credibility of witnesses is an issue for the jury to resolve at trial:

> And when the disposition of a case turns on a determination of intent, courts must be especially cautious in granting summary judgment, since the resolution of that issue depends so much on the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination.

Morrison v. Nissan Co., Ltd., 601 F.2d 139 (4th Cir. 1979) at 141.

4. The Presiding District Court Judge and the Appellate Judges Ignored Proof of Record of Defendants' Obstruction of Justice:

The defendants refused to answer my second set of discovery requests; and I responded by filing my second motion to compel defendants to not only answer my second set of discovery requests, but also to answer those requests of my first set that they refused to answer. D.E. 59. The defendants filed their motion to stay discovery on the same day. D.E. 58. Judge Turk granted defendants' motion to stay (D.E. 62), thereby denying me a hearing of my motion to compel.

B&W had sent me to defendant EACV in retaliation for my complaining of acts made unlawful by Title VII. EACV had me take the Minnesota Multiphasic Personality Inventory Test ("MMPI"). EACV later showed me the test results, which were in the form of an MMPI Interpretation and an MMPI Chart, both of which were purportedly prepared by Dr. E. Wayne Sloop, a local psychologist. The MMPI Interpretation contained the signature, "E. Wayne Sloop, Ph.D." EACV eventually provided the Department of Energy and the Veterans Administration with a copy of these two documents.

Because I suspected that the MMPI Interpretation and related MMPI Chart were fraudulent, I elected to exercise my right to test the original MMPI Interpretation and related MMPI Chart for authenticity, as allowed by Fed. R. Civ. P, Rule 901. On November 2, 1994 I served my subpoena duces tecum on EACV in which I specifically requested that EACV produce these two documents.

The defendants responded by stating in their Jon Geier, counsel for defendants letter of January 4, 1995 to me that the MMPI Interpretation was no longer in my confidential record maintained by EACV. The defendants

therefore admit to removing the MMPI Interpretation from my confidential record maintained by EACV.

On January 9, 1995 I filed a copy of the letter as "Exhibit O" to my Supplement to Plaintiff's Memorandum in Support of Plaintiff's Motion to Compel the defendants to answer my discovery requests, as proof that the defendants had removed confidential personality test-related documents from my confidential record maintained by EACV. Defendants' removal of documents from my confidential record is in violation of § 54.1-2400.6 of the Code of Virginia, and represents obstruction of justice.

If said MMPI Interpretation and related MMPI Chart are in fact fraudulent, then B&W and EACV committed the crime of knowingly making misrepresentations to two government agencies, as defined by Title 18, Section 1001. of the U.S. Code.

B. Appellant Would Have Had a Good Claim:

The **EEOC Proof of Prima Facie Retaliatory Discharge** (causal connection), the **Loyalty Issue**, the **Consent Issue** and the issue of my credibility qualified at least my retaliatory discharge claim for trial; but the normal judicial process was circumvented by the fraud documented herein.

> * * * a showing must be made that the movant would have had a good claim or defense in the main action.

Wilkin v. Sunbeam Corporation, 466 F.2d 714 (1972) at 717.

II. THE RECORD CONTAINS PROOF OF FRAUD ON THE COURT BY THE PRESIDING DISTRICT COURT JUDGE AND BY THE APPELLATE JUDGES:

The presiding District Court judge states in his Memorandum Opinion that the record contains no evidence of the causation element of prima facie retaliatory discharge; and that the record contains no evidence that B&W's

proffered reason for firing me was a pretext:

> * * * Clements has failed to prove the causation element. * * * Because plaintiff has presented no evidence, other than the fact of his termination, to show retaliatory intent, he has failed to make out a prima facie case of discrimination. * * * More importantly, plaintiff has not presented a shred of evidence, other than bare allegations, to meet his burden to show that B&W would not have terminated him but for his claims with the EEOC. * * * Clements has not presented a scintilla of evidence to show that B&W's stated reasons for his discharge were merely a pretext.

Memorandum Opinion, D.E. 67 at 9, 10, 11.

The record does indeed contain evidence of the "causation element". The EEOC found that B&W's discharge document -- namely, the Disciplinary Report -- is the causal connection between my complaining of acts made unlawful by Title VII and B&W's firing me. A copy of the Disciplinary Report, which is a signed-and-dated admission that B&W fired me for complaining of harassment, discrimination and retaliation, is on record as "Attachment Y" to my Second Amended Complaint (D.E. 22); and as "Exhibit M" to defendants' Statement of Undisputed Material Facts (D.E. filed 12/9/94). See also the transcript of the hearing of defendants' motion for summary judgment, D.E. 66 at 29, 30.

Further, the record contains the original deposition transcript of defendant Conner, then Vice President and General Manager of B&W, Naval Nuclear Fuel Division, which documents that he stated that he had no reason to believe that I was a disloyal employee (D.E. 63; D.E. 69). B&W claims that I was fired for disloyalty; and B&W says that I was not a disloyal employee. Clearly, Conner's

me is a pretext.

Summarizing, the presiding District Court judge made false statements to the court via his Memorandum Opinion, in that he stated that the record did not contain evidence of a "causal element", nor of pretext -- even though the record does in fact contain said evidence; and he then relied on his own false statements as grounds for granting defendants' motion for summary judgment. But what is worse, the appellate judges affirmed on his reasoning.

How can it be said that the presiding judge and the appellate judges grounded their dismissal of my case on determination of the merits of evidence they claim is not on record? Neither court addressed the evidence of record creating genuine issues of material fact.

III. FRAUD ON THE COURT AFFECTS MANY:

I am not the only person injured by the fraud reported herein:

> * * * Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of the litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S.Ct. 997 at 1001, 322 U.S. 238.

The spirit of the 'fraud on the court' rule is applicable

whenever the integrity of the judicial process or functioning has been undercut * * *

Greater Boston Television Corporation v. F.C.C., 463 F.2d 268 (1971) at 279.

I declare, under penalty of perjury that the foregoing is true and correct to the best of my knowledge and understanding. Executed on December 2, 1996.

/s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr., pro se

CONCLUSION

For the reasons given above, I, pro se Appellant Clyde E. Clements, Jr. respectfully request that my Motion to Vacate Judgments be granted; and that the judgments of the United States Court of Appeals for the Fourth Circuit identified in the foregoing Motion to Vacate Judgments be vacated and set aside.

Further, I respectfully request that the Appeals Court conduct an en banc de novo review of my appeal after the litigants have re-briefed the case; and that each judgment contain the authentic signature of all of the judges responsible for the judgment.

December 2, 1996
Respectfully submitted,

/s/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr. pro se
Post Office Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of December, 1996, I caused a copy of the foregoing Appellant's Motion To Vacate Judgments, together with attached Memorandum of Points and Authorities in Support of Appellant's Motion to Vacate Judgments to be served by U.S. first-class mail upon Jon A. Geier for PAUL, HASTINGS, JANOFSKY & WALKER, 1299 Pennsylvania Avenue, N.W., Tenth Floor, Washington, D.C. 20004-2400, counsel for defendants.

/s/ Clyde E. Clements, Jr.

Clyde E. Clements, Jr., pro se Appellant

No. 95-1314

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CLYDE E. CLEMENTS, JR.

Petitioner,

V.

THE BABCOCK & WILCOX COMPANY, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

Clyde E. Clements, Jr., pro se
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Justice Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev., 133 (1990) 6

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on April 15, 1996, and (2) granting the petition. As grounds for this motion, petitioner states the following:

The presiding United States District Court judge carried out numerous abuses of discretion which, viewed as a whole display a pattern of intentional misconduct; a scheme the intent of which was to prevent instant case from proceeding to trial *regardless* of the weight of evidence of record in support of his claims. The thus-far successful scheme was deliberate and unconscionable, and represents fraud on the court on the part of the presiding judge.

> In order to set aside a judgment or order because of fraud upon the court under rule providing for such relief, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.

Lockwood v. Bowles, 46 F.R.D. 625 (1969) at 626.

There has never been an employment discrimination suit that could have survived the assault waged on instant case by the judge, the details of which are on record:

I. STATEMENT OF FACTS OF RECORD MATERIAL TO THIS PETITION THAT ARE UNDISPUTED

Petitioner-plaintiff Clyde E. Clements, Jr. ("Mr. Clements") was fired by his former employer, The Babcock & Wilcox Company ("B&W") on September 21, 1992. On the same day B&W issued its discharge document relating to

its firing of Mr. Clements. Cert. at 7, 8.[1] Thereafter, Mr. Clements timely filed his charge of retaliatory discharge with the Equal Employment Opportunity Commission ("EEOC"). Cert. at 8.

The EEOC subsequently stated, "The evidence of record supports Charging Party's allegation that he was discharged in part in retaliation for opposing practices made unlawful by Title VII." in its Letter of Determination, a copy of which was filed with the District Court as "Attachment Y" to his Second Amended Complaint. Cert. at 8, 20a thru 22a. ("**EEOC Proof of Prima Facie Retaliatory Discharge**")

Mr. Clements timely filed his retaliatory discharge claim against B&W, et al., with the District Court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq., as Count Two of his Second Amended Complaint. Cert. at 8.

B&W claims in its motion for summary judgment that Mr. Clements was fired for disloyalty. Cert. at 9. Mr. Clements asked Respondent-defendant James Conner ("Conner"), then Vice President and General Manager of B&W's Naval Nuclear Fuel Division, during the taking of his deposition, "Do you have any reason to believe that I was a disloyal employee?"; to which Conner responded, "No." Cert. at 9, 10, 43a. Conner's deposition is in the record as D.E. 69(Vol.7).[2]

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[1] "Cert. at ___" refers to the page numbers of Mr. Clements' Petition for Writ of Certiorari.

[2] "D.E. ___" refers to the docket entry numbers on the docket sheets maintained by the District Court.

Conner's "No" response contradicts B&W's key assertion that it fired Mr. Clements for disloyalty. **("Loyalty Issue")**

Mr. Clements alerted the District Court in his first motion to compel B&W, Employee Assistance of Central Virginia, Inc. ("EACV") and E. Wayne Sloop to answer his discovery requests (D.E. 46) that at least two documents had been removed from his confidential file maintained by EACV, which is in violation of § 54.1 of the Code of Virginia. Mr. Clements knew of the existence of the documents because EACV had previously provided two government agencies with copies.

The motion to compel also contained a list of witnesses Mr. Clements was preparing to subpoena to give testimony in the hearing of his motion to compel for the purpose of determining why and how the documents disappeared from his EACV file. The judge quashed Mr. Clements' subpoenas (D.E. 52) before they had been served.

Mr. Clements filed his second motion to compel B&W to answer his first and second set of discovery requests on March 5, 1995. D.E. 59. In his motion he requested that it be heard along with defendants' motions for summary judgment in the hearing that had already been set. B&W filed its motion to stay discovery on the same day. D.E. 58.

The Court granted B&W's motion to stay discovery on March 7, 1995 (D.E. 62), thereby denying Mr. Clements a hearing of his motion to compel. The hearing of defendants' motions for summary judgment took place on March 9, 1995. D.E. 66(Vol.5).

During the hearing of defendants' motions for summary judgment the judge - *even though the record contained the EEOC's finding that the incident Mr. Clements complained of as sexual harassment occurred* (Cert. at 25a) - said to Mr. Clements,

> But a person that is paranoid never knows that they are paranoid and you can never reach them on these things. * * * that's a horrible thing to do if the lady didn't do it. * * * And she says that she didn't recall that any buttons were unbuttoned. What else could she do in denying it? This lady has vehemently --- And, you know, if you've made this up on this lady, that's a terrible, terrible thing to do. * * * I think that, you know, whether it occurred --- I think you think that it occurred. I'm not saying that you are intentionally lying. * * * That is an inditia of paranoia * * * Have you been to a psychiatrist?

D.E. 66(Vol.5) at 19, 21, 22, 25, 26

The judge also said to Mr. Clements,

> Well, I don't know how you could be more unloyal.[3] * * * I think they had to terminate you, didn't you? * * * I'm just asking you are you willing voluntarily to cease and desist or is the court going to have to take some action against you? * * *

D.E. 66(Vol.5) at 23, 27, 37

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[3] Here the judge asserts and apparently relies on what appears to be his personal opinion instead of allowing the **Loyalty Issue** to proceed to trial.

The record documents that Mr. Clements brought the **EEOC Proof of Prima Facie Retaliatory Discharge** and the **Loyalty Issue** before the District Court numerous times. Cert. at 14 thru 18, 48a, 49a.

The District Court granted defendants' motion for summary judgment, thereby dismissing Mr. Clements' retaliatory discharge claim, stating in its Memorandum Opinion (Cert. at 16a, 17a),

> Because plaintiff has presented no evidence, other than the fact of his termination, to show retaliatory intent, he has failed to make out a prima facie case of discrimination. * * * Clements has not presented a scintilla of evidence to show that B&W's stated reasons for his discharge were merely a pretext.

The District Court did not address - nor did it even mention - the **EEOC Proof of Prima Facie Retaliatory Discharge** or the **Loyalty Issue** in its Memorandum Opinion. Cert. at 5a thru 19a.

Thereafter, Mr. Clements appealed the District Court's dismissal of his case to the United States Court of Appeals for the Fourth Circuit ("Appeals Court"). The Appeals Court affirmed on the reasoning of the District Court, finding no reversible error; and denied Mr. Clements' motion for oral argument. Cert. at 3a and 4a.

Thereafter, Mr. Clements filed with the Appeals Court his Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc, which alerted the Appeals Court to the courts' oversight of the **EEOC Proof of Prima Facie Retaliatory Discharge** and the **Loyalty Issue**

contained in the record of the District Court. Cert. at 27a thru 42a. Mr. Clements' Petition for Rehearing was denied. Cert. at 1a, 2a.

The District Court and Appeals Court's oversight of the **EEOC Proof of Prima Facie Retaliatory Discharge** and the **Loyalty Issue**; and the Appeals Court's failure to reverse at least in part and remand at least Mr. Clements' retaliatory discharge claim for trial was brought to the attention of this Court in his Petition for Writ of Certiorari. Cert. at 14 thru 18, 27 thru 29.

II. SCHEME OF ABUSES OF DISCRETION

Following are some of the abuses of discretion:

A. Not only did the judge not give deference to the EEOC's findings,[4] he completely ignored them - namely, the **EEOC Proof of Prima Facie Retaliatory Discharge**;

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[4] Justice Ginsburg (then appeals court judge for the D.C. Circuit), in her 1990 Washington Law Review article entitled "Remarks on Writing Separately", states,

> * * * We permit our appellate judges to disagree or distance themselves from the court's judgment by dissenting or concurring opinion. At the same time, we have doctrines, like *deference to expert administrative determinations*, that serve, among other purposes,[6] to keep the individuality of our judges within tolerable bounds. [Italics added]

65 Wash. L. Rev., 133, 134 (1990).

B. The judge prevented Mr. Clements from fully and fairly presenting his case by denying him a hearing of his motion to compel B&W to answer his discovery requests and by granting defendants' motion to stay discovery. The judge then compounded his error by granting defendants' motion for summary judgment on the ground that Mr. Clements had presented no evidence in support of his claims (*supra.*, at 5). "*Rule 60(b)(3) Requirements:* * * * The conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense." Rozier v. Ford Motor Co., 573 F.2d 1332 (1978) at 1339.

C. The judge completely ignored facts of record that created a genuine issue for trial - namely, the **Loyalty Issue** (*supra.*, at 2, 3). "District court may not resolve conflicts in evidence on summary judgment motions." Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) at 149;

D. The judge put Mr. Clements' credibility on trial during the hearing of defendants' motion for summary judgment, and appears to have found him guilty of unintentionally lying as a result of paranoia (*supra.*, at 4). D.E. 66(Vol.5) at 19, 22, 25, 26. Credibility of witnesses is an issue for the jury to resolve:

> And when the disposition of a case turns on a determination of intent, courts must be especially cautious in granting summary judgment, since the resolution of that issue depends so much on the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination.

Morrison v. Nissan Co., Ltd., 601 F.2d 139 (4th Cir. 1979) at 141.

III. PROOF OF FRAUD ON THE COURT

A. Upon Mr. Clements' presenting evidence in support of his claim of sexual harassment during the hearing of defendants' motions for summary judgment, the judge launched his attack on Mr. Clements' credibility, which included implications that Mr. Clements had unintentionally lied about the incident of alleged sexual harassment as a result of paranoia. In doing so, however, he created proof by clear and convincing evidence as to the existence of his scheme of fraud on the court:

Specifically, at the time of the hearing of defendants' motions for summary judgment the record contained documentation of the EEOC's finding that the incident Mr. Clements complained of as sexual harassment did in fact occur. Cert. at 25a. Further, the defendants alerted the judge as to its existence early in the hearing when they referred to the EEOC's finding and right to sue letter that were issued. D.E. 66(Vol.5) at 6.

It therefore logically follows that the judge - at the time he attacked Mr. Clements' credibility upon Mr. Clements' presenting his claim of sexual harassment during the hearing - had knowledge of the EEOC's finding that the incident Mr. Clements complained of as sexual harassment occurred. It does *not* logically follow that a judge would challenge the veracity of a litigant's claim that had been corroborated by an EEOC investigation - *unless* the judge had an ulterior motive for doing so.

The only logical explanation for the judge's implying that Mr. Clements' complaining of sexual harassment was due to paranoia was to give the appearance of justification for his numerous other abuses of discretion - a smoke screen, if you will, for the covering up of his intentional and unconscionable scheme of fraud on the court.

B. The judge stated in his Memorandum Opinion that Mr. Clements had presented no evidence of prima facie retaliatory discharge; and that he had presented no evidence that B&W's proffered reason for firing him was a pretext. Mr. Clements presented to the court the **EEOC Proof of Prima Facie Retaliatory Discharge** and the **Loyalty Issue** during the hearing of defendants' motions for summary judgment, as well as in his briefs filed with the court. It therefore logically follows that the judge *knew* at the time he made his abovementioned statements that they were false.

IV. PETITIONER WOULD HAVE HAD A GOOD CLAIM

The **EEOC Proof of Prima Facie Retaliatory Discharge** and the **Loyalty Issue** qualified Mr. Clements' retaliatory discharge claim for trial; but the normal judicial process was circumvented by the fraud reported herein. " * * * a showing must be made that the movant would have had a good claim or defense in the main action." Wilkin v. Sunbeam Corporation, 466 F.2d 714 (1972) at 717.

V. FRAUD ON THE COURT AFFECTS MANY

Mr. Clements is not the only person affected by the fraud reported herein:

> * * * Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of the litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S.Ct. 997 at 1001, 322 U.S. 238.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

May 7, 1996

Respectfully submitted,

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CERTIFICATE OF PRO SE PETITIONER

As pro se petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

May 7, 1996

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Pro Se Petitioner